

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ARCHWAY INSURANCE SERVICES,
LLC, et al.,

Plaintiff(s),

v.

JAMES HARRIS, et al.,

Defendant(s).

2:11-CV-1173 JCM (CWH)

ORDER

Presently before the court is defendants James Harris', Harris Consulting Services, Inc.'s, and Gregory Harris' first motion for summary judgment. (Doc. # 95). Plaintiffs Archway Insurance Services, LLC, Union One Insurance Group, LLC, Nevada Investment Partners, LLC, and Trinity Capital Management Group, LLC, filed a response (doc. # 100), and defendants filed a reply (doc. # 117).

I. Background

This matter arises out of the financing and purchase of the Harris Agency ("THA"), an insurance business, and was originally filed in the Eastern District of Pennsylvania. Upon motion of all of the defendants, the portion of the case relating to the defendants herein, (James Harris, Harris Consulting Services, Inc. and Gregory Harris) was transferred to this court, and the portion relating to various bank defendants was transferred to the United States District Court for the District of Kansas. Only counts one and two of the complaint for fraud and breach of contract are being

1 litigated in this district.

2 On January 4, 2013, defendants served requests for documents, interrogatories, and requests
3 for admission upon plaintiffs. Plaintiffs failed to respond within 30 days, and the requests were
4 deemed admitted pursuant to Fed. R. Civ. P. 36(a). Defendants then filed the instant motion on
5 February 27, 2013, based almost exclusively on those deemed admissions.¹

6 On March 21, 2013, plaintiffs filed a motion to withdraw the deemed admissions. (Doc. #
7 98). On May 31, 2013, Magistrate Judge Hoffman heard oral argument and granted plaintiffs'
8 motion to withdraw. (See docket # 129).

9 **II. Legal Standard**

10 Summary judgment is appropriate when, viewing the facts in the light most favorable to the
11 nonmoving party, there is no genuine issue of material fact, and the moving party is entitled to
12 judgment as a matter of law. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996); Fed. R. Civ. P.
13 56©. An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable fact
14 finder could find for the nonmoving party, and a dispute is material only if it could affect the
15 outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49
16 (1986). The moving party bears the burden of informing the court of the basis for its motion,
17 together with evidence demonstrating the absence of any genuine issue of material fact. *Celotex*
18 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has satisfied its burden, it is
19 entitled to summary judgment if the non-moving party fails to present, by affidavits, depositions,
20 answers to interrogatories, or admissions on file, "specific facts showing that there is a genuine issue
21 for trial." *Id.* at 324; Fed. R. Civ. P. 56©.

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26 ¹ On March 27, 2013, defendants filed a second motion for summary judgment based on grounds separate and
27 apart from the deemed admissions. (Doc. # 102). However, this order rules only on defendants' first motion for
28 summary judgment. (Doc. # 95).

1 **III. Discussion**

2 In their motion, defendants' introductory paragraph states that "[t]his motion specifically
3 addresses [p]laintiffs' complete failure to respond to detailed discovery that [d]efendants have served
4 in this case. Among the discovery are requests for admissions. Plaintiffs have not responded
5 whatsoever to any of the requests for admissions served by [d]efendants. Because the requests for
6 admissions address both claims for relief being made by [p]laintiffs, the admissions that are deemed
7 to occur when a party chooses not to respond to requests for admission require that judgment be
8 entered in favor of [d]efendants." (See defendants' first motion for summary judgment, doc. # 95,
9 p. 2). Thus, it is clear that the instant motion is premised upon plaintiffs' failure to timely respond
10 to discovery requests.

11 **Fraud (count 1)**

12 To establish a claim for fraud, a plaintiff must prove that: (1) the defendant made a false
13 representation; (2) with knowledge or belief that the representation was false or without a sufficient
14 basis for making the representation; (3) with the intent to induce the plaintiff to act or refrain from
15 acting on the representation; (4) which representation the plaintiff justifiably relies upon; and (5)
16 which reliance damages the plaintiff. *Bulbman, Inc. v. Nevada Bell*, 825 P.2d 588 (Nev. 1992);
17 *Nevada Power Co. v. Monsanto Co.*, 891 F. Supp. 1406 (D. Nev. 1995).

18 Additionally, any claim for fraud must be pled with particularity under Federal Rule of Civil
19 Procedure 9(b). *Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999). To meet this standard,
20 plaintiffs must present details regarding the "time, place, and manner of each act of fraud, plus the
21 role of each defendant in each scheme." *Lancaster Com. Hosp. V. Antelope Valley Hosp. Dist.*, 940
22 F.2d 397, 405 (9th Cir. 1991).

23 In contesting the basis for plaintiffs' claims for fraud, defendants do not argue that plaintiffs
24 have failed to plead or otherwise allege facts sufficient to establish a claim for fraud. Instead,
25 defendants rely almost exclusively on the deemed admissions to requests number 10 ("[a]dmit that
26 no false statements are contained in the Production Report that is attached hereto as Ex. 1") and
27 number 11 ("[a]dmit that [p]laintiffs' fraud claim against James Harris and Gregory Harris is false
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1 and without factual basis"). (*See* defendants' first motion for summary judgment, doc. # 95, at p. 9).

2 Despite being improper requests, as they seek admissions to admittedly contested facts, the
3 deemed admissions were withdrawn pursuant to Magistrate Judge Hoffman's subsequent order. (*See*
4 docket # 129). Because the instant motion is based upon those withdrawn admissions, the court
5 finds that defendants have not satisfied their burden to demonstrate the absence of any genuine issue
6 of material fact. *Celotex*, 477 U.S. 317. Accordingly, the court declines to grant defendants' first
7 motion for summary judgment on plaintiffs' fraud claims.

8 **Breach of contract (count 2)**

9 Plaintiffs assert claims for breach of contract regarding: (1) an alleged loan made to a THA
10 employee, Dianne Curry, at the request of defendant James Harris, and (2) an alleged loan guaranty
11 for the second tranche of the account acquisition purchase price. As with the fraud claims,
12 defendants' argument that they are entitled to summary judgment on plaintiffs' breach of contract
13 claims is based primarily based upon deemed admissions.

14 As to the breach of contract claim regarding Curry, defendants rely heavily upon deemed
15 admissions to requests number 18 ("[a]dmit that the allegations contained in [p]aragraph 63 of
16 [p]laintiffs' [c]omplaint are false and without good and proper factual basis"), and number 35
17 ("[a]dmit that none of [p]laintiffs provided or paid any monies to Dianne Curry during the time that
18 she worked for The Harris Agency, LLC"), among others. For the reasons discussed above, these
19 requests were improper, and were withdrawn in any event.

20 In addition to their reliance on the deemed admissions, defendants argue they are entitled to
21 summary judgment on plaintiffs' breach of contract claim regarding Curry because the payment was
22 not a "loan" but was instead a "non-refundable sign-on bonus." Again, defendants do not provide
23 any support from the record for this assertion, whether it be deemed admissions or otherwise.

24 Accordingly, defendants have not satisfied their burden and their first motion for summary
25 judgment on plaintiffs' breach of contract claims is denied.

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1 **IV. Conclusion**

2 As defendants admit, “[a]bsent the [c]ourt’s granting of [p]laintiffs’ separate motion to
3 withdraw admissions, [p]laintiffs have not provided a basis for denying the Harrises’ motion for
4 summary judgment.” (See defendants’ reply in support of motion for summary judgment, doc. #
5 117, p. 3). Because defendants’ first motion for summary judgment is premised on deemed
6 admissions, and because the court has subsequently granted plaintiffs’ request to withdraw those
7 admissions, the court denies defendants’ motion. The court finds that defendants have failed to
8 provide appropriate evidence demonstrating the absence of any genuine issue of material fact.
9 *Celotex*, 477 U.S. 317.

10 Defendants have filed a second motion for summary judgment containing additional grounds
11 for an adjudication in their favor that are separate and apart from the grounds relied upon here. (See
12 doc. # 102). To be clear, the instant order rules solely on defendants’ first motion for summary
13 judgment based upon deemed admissions. (Doc. # 95). The court will issue a separate order ruling
14 on defendants’ second motion for summary judgment.

15 Accordingly,

16 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants’ first motion
17 for summary judgment (doc. # 95) be, and the same hereby is, DENIED.

18 DATED September 26, 2013.

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21 UNITED STATES DISTRICT JUDGE
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